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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOVANTE TAYLOR,

Defendant and Appellant.

C081113

(Super. Ct. No. 15F02313)

A jury found defendant Jovante Taylor guilty of second degree robbery (Pen. Code, § 211)¹ and found true the allegation that he personally used a firearm in the commission of the robbery (§ 12022.53, subd. (b)). The trial court sentenced him to an aggregate term of 13 years in state prison.

On appeal, defendant contends the judgment must be reversed because his robbery conviction and the firearm enhancement are not supported by substantial evidence.

¹ Undesignated statutory references are to the Penal Code.

Defendant further contends that reversal is required because the trial court misinstructed the jury on the “immediate presence” element of robbery. In a supplemental brief, defendant asserts that remand is warranted in light of Senate Bill No. 620 (2017-2018 Reg. Sess.), which amended section 12022.53 to give sentencing courts discretion to strike or dismiss the firearm enhancement imposed in this case. We agree that the matter must be remanded to allow the trial court to determine whether to exercise its newly granted discretion to strike or dismiss the firearm enhancement. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2015, Janet Scott was the owner of the Valero gas station and convenience store located on Coloma Road in Rancho Cordova. Around 7:10 p.m. on April 2, 2015, she went outside her store to inspect some landscaping work. As she was returning to the store, she saw a man approaching the front door. He was wearing a jacket with red stripes and had a hood over his head. When Scott was approximately 20 feet from the man, she saw him pull out a silver and black semiautomatic handgun as he was entering the store.

Scared and shaking, Scott ran as fast as she could to a nearby grocery store and called the police. She told the 911 dispatcher that a man was inside her store with a handgun. When asked for a description of the man, she said he was wearing all black clothing and appeared to be Hispanic. She explained, however, that she was unsure of the man’s race because he was wearing a hood that partially covered his face. Before hanging up, Scott told the dispatcher that the man had left the store and was heading on foot toward the apartment complex next to the gas station. A recording of the 911 call was played for the jury. At trial, Scott explained that she was unable to get a good look at the man’s face because, in addition to the hood covering his face, it was dark outside.

After the police arrived at the scene, Scott and one of the officers reviewed the surveillance footage captured by the store's security cameras. A video recording of the incident, which shows multiple viewpoints inside the store, was played for the jury. The video shows a man enter the store holding a gun. The man takes some cigars and then leaves the store. Shortly thereafter, the man reenters the store, takes some cigarettes, and then leaves the store. At trial, Scott testified that she recognized the man in the video from his distinctive clothing and shoes—a black jacket with red stripes and black shoes with stripes.

When a crime scene investigator reviewed the surveillance footage, he noticed that the man had touched several items with his bare hands. Thereafter, the investigator lifted three fingerprints from a cigar box and a cigarette package. A forensic identification specialist analyzed the fingerprints and determined that two of them belonged to defendant.²

On April 9, 2015, the detective investigating the crime was informed that defendant's fingerprints matched the fingerprints obtained from the convenience store. Less than a week later, a search warrant was executed at defendant's apartment, which was located in the apartment complex next to the gas station. During the search, the detective found a loaded, dark gray and silver, nine-millimeter semiautomatic handgun in the master bedroom. He also found shoes and a jacket that matched what the suspect was wearing in the surveillance footage.

Scott was unable to identify defendant from a photographic lineup. However, she recognized the items found in his apartment.

² At trial, the forensic identification specialist explained that one of the fingerprints obtained from the convenience store was not “a great print.” As a consequence, she was unable to determine whether or not it belonged to defendant.

At trial, the forensic identification specialist “rolled” defendant’s fingerprints and identified him, again, as the person who had left fingerprints inside the store.

After a jury trial, defendant was found guilty of second degree robbery. (§ 211.) The jury also found true the allegation that he personally used a firearm in the commission of the robbery. (§ 12022.53, subd. (b).) The trial court sentenced him to an aggregate term of 13 years in state prison, consisting of the midterm of three years on the robbery offense, plus 10 years for the firearm enhancement.

Defendant filed a timely notice of appeal.

DISCUSSION

1.0 Substantial Evidence

1.1 Standard of Review

“ ‘In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ ” (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We reverse for lack of substantial evidence only if “ ‘upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ ” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) “ ‘We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction.’ ” (*People v. Wilson* (2008) 44 Cal.4th 758, 806 (*Wilson*).)

1.2 Robbery Conviction

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of

force or fear.” (§ 211.) “The crime is essentially a theft with two aggravating factors, that is, a taking (1) from victim’s person or immediate presence, and (2) accomplished by the use of force or fear.” (*Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 221.)

Defendant contends his robbery conviction must be reversed because there was insufficient evidence presented at trial to establish a taking from Scott’s immediate presence accomplished by means of force or fear. We disagree.

1.2.1 Immediate Presence

Under the robbery statute, “the requirement that the taking be from the ‘ “person” ’ or ‘ “immediate presence” ’ of the victim describes a spatial relationship between the victim and the victim’s property, and refers to the area from which the property is taken.” (*People v. Frye* (1998) 18 Cal.4th 894, 955-956, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see *People v. Gomez* (2008) 43 Cal.4th 254, 257 (*Gomez*).) The generally accepted definition of “immediate presence” is that a thing is in the immediate presence of a person when it is “ “so within h[er] reach, inspection, observation or control, that [s]he could, if not overcome by violence or prevented by fear, retain h[er] possession of it.” ’ [Citations.] Thus, . . . immediate presence “ “must mean at least an area within which the victim could reasonably be expected to exercise some physical control over [her] property.” ’ [Citation.] Under this definition, property may be found to be in the victim’s immediate presence ‘even though it is located in another room of the house, or in another building on [the] premises.’ ” (*People v. Hayes* (1990) 52 Cal.3d 577, 626-627 (*Hayes*); see *Gomez, supra*, 43 Cal.4th at p. 257.)

“[T]he decisions addressing the ‘immediate presence’ element of robbery have focused on whether the taken property was located in an area in which the victim could have expected to take effective steps to retain control over h[er] property.” (*People v. Frye, supra*, 18 Cal.4th at p. 956; see, e.g., *Gomez, supra*, 43 Cal.4th at p. 265

[immediate presence requirement was satisfied when the defendant fired two shots at the victim from a distance of 100 to 150 feet while fleeing with the property]; *People v. Harris* (1994) 9 Cal.4th 407, 422-424 [immediate presence requirement satisfied where victim was restrained in vehicle 35 to 80 feet away from office buildings and “ ‘around the corner of the same block’ ” his house was on]; *People v. Webster* (1991) 54 Cal.3d 411, 440 [reasonable trier of fact could find the immediate presence requirement satisfied when the distance between the stolen property and the murder scene was a quarter of a mile]; *Hayes, supra*, 52 Cal.3d at pp. 628-629 [reasonable trier of fact could conclude immediate presence element was met where victim was killed in room 107 feet from location of stolen property].)

Here, the immediate presence element of robbery is supported by substantial evidence. The prosecution presented sufficient evidence from which a reasonable trier of fact could find beyond a reasonable doubt that defendant took property from Scott’s immediate presence. Scott testified that she was approximately 20 feet from defendant when she saw him pull out a handgun as he was entering the convenience store. She further testified that, scared and shaking, she ran as fast as she could to a nearby grocery store and called the police. While she was on the phone with the 911 dispatcher, defendant left the area with several items from the store. But for defendant’s conduct, Scott would have stayed at the gas station and retained her property inside the store. She was in “ ‘ “an area within which [she] could reasonably be expected to exercise some physical control over [her] property.” ’ ” (*Hayes, supra*, 52 Cal.3d at p. 627.) The fact that defendant completed the theft after Scott fled in fear does not negate the immediate presence element. (See *People v. Hays* (1983) 147 Cal.App.3d 534, 541-542 (*Hays*) [defendant crashed through office ceiling with rifle, causing victim to flee in fear before taking occurred].)

1.2.2 Force or Fear

A robbery can be “accomplished by means of force or fear.” (§ 211.) This element is cast in the alternative; it may be accomplished either by force or by fear. At trial, the prosecution’s theory was that the robbery was accomplished by means of fear.

To establish fear for the purpose of a robbery conviction, there must be evidence “ ‘from which it can be inferred that the victim *was in fact afraid*, and that such fear allowed the crime to be accomplished.’ [Citation.] Actual fear may be inferred from the circumstances, and need not be testified to explicitly by the victim.” (*People v. Cuevas* (2001) 89 Cal.App.4th 689, 698.) The fear is sufficient if it facilitated the defendant’s taking of the property. Thus, any intimidation, even without threats, may be sufficient. (*People v. Morehead* (2011) 191 Cal.App.4th 765, 774-775.) The intent to cause the victim to experience fear is not an element of robbery. (*People v. Anderson* (2011) 51 Cal.4th 989, 995.) Nor is resistance by the victim a required element of robbery, and the victim’s fear need not be extreme to constitute robbery. (*Morehead*, at p. 775.) “All that is necessary is that the record show ‘ ‘ ‘conduct, words, or circumstances reasonably calculated to produce fear’ ” ’ ” (*Ibid.*)

Here, the fear element of robbery is supported by substantial evidence. The prosecution presented sufficient evidence from which a reasonable trier of fact could find beyond a reasonable doubt that Scott was actually afraid during defendant’s commission of the crime, and that such fear allowed defendant to accomplish the crime. Scott testified that she fled from the gas station in fear after she saw defendant pull out a handgun as he was entering the convenience store. Defendant’s intimidating conduct in deploying a handgun to facilitate the theft was sufficient to establish the fear element. (See *Hays, supra*, 147 Cal.App.3d at p. 542 [substantial evidence supported jury’s force or fear finding where victim fled in fear after defendant crashed through office ceiling with rifle].)

1.3 *Firearm Enhancement*

Defendant contends reversal is required because there was insufficient evidence presented at trial to support the jury's finding that he personally used a firearm within the meaning of section 12022.53, subdivision (b). According to defendant, the personal use element of the enhancement was not established because he did not deliberately display his handgun to Scott, made no demand of Scott, and did not otherwise "use" the handgun to take items from the convenience store. This claim has no merit.

"The Legislature created enhancements for defendants who are armed with a firearm in the commission of a felony (see § 12022, subd. (a)(1)) and those who personally use a firearm in the commission of a felony (see, e.g., §§ 12022.5, 12022.53). The penalties for the use of a firearm are greater than those provided for merely being armed at the time a felony is committed. [Citations.] [¶] The difference in penalties correspond[s] to the difference between the danger presented by one's merely being armed, in which case there is the *potential* that the firearm will be employed in the commission of a felony, and the 'use' of the weapon, in which case the firearm was employed in the commission of the felony." (*People v. Smit* (2014) 224 Cal.App.4th 977, 987.)

Section 12022.53, subdivision (b) provides that "any person who, in the commission of a felony specified in subdivision (a) [including robbery], personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply."

" 'There are no precise formulas, or particular fact patterns to follow, to determine whether a gun has been "used" for purposes of a sentence enhancement.' " (*People v. Wardell* (2008) 162 Cal.App.4th 1484, 1492.) " 'Although the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually

produces harm but only conduct *which produces a fear of harm or force by means or display of a firearm in aiding the commission of one of the specified felonies*. “Use” means, among other things, “to carry out a purpose or action by means of,” to “make instrumental to an end or process,” and to “apply to advantage.” [Citation.] The obvious legislative intent to deter the use of firearms in the commission of the specified felonies requires that “uses” be broadly construed.’ ” (*Wilson, supra*, 44 Cal.4th at p. 806.)

“[A] gun is ‘used’ when there is evidence of gun-related *conduct* coupled with the intent the gun-related action *facilitate the crime . . .*” (*Alvarado v. Superior Court* (2007) 146 Cal.App.4th 993, 1005.) If the defendant took some action with the gun in furtherance of the commission of the crime, the gun was “used” for purposes of a sentence enhancement. (*Id.* at p. 1003.) By contrast, if the defendant engaged in no weapons-related conduct, or such conduct was incidental and unrelated to the offense, no “use” occurred. (*Ibid.*)

Here, substantial evidence supports the jury’s true finding on the firearm enhancement. The prosecution presented sufficient evidence from which a reasonable trier of fact could conclude beyond a reasonable doubt that defendant personally used a firearm to facilitate the commission of the crime. The evidence at trial showed that defendant pulled out a handgun as he was entering the convenience store, which produced a fear of harm; it caused Scott to flee the area and call the police. Thereafter, defendant took several items from the store.

Contrary to defendant’s contention, his gun-related conduct falls well within the broad construction given to the phrase “personally uses a firearm” in the enhancement statute. Defendant’s argument that the enhancement does not apply because he did not deliberately display his handgun to Scott or make a demand to her finds no support in the text of the enhancement statute and is inconsistent with the purpose of the statute. The enhancement is not limited to “situations where the gun is pointed at the victim or the

defendant issues explicit threats of harm.” (*People v. Granado* (1996) 49 Cal.App.4th 317, 322; see *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1059.) “Personal use of a firearm may be found where the defendant intentionally displayed a firearm in a menacing manner in order to facilitate the commission of an underlying crime.” (*Carrasco*, at p. 1059.) When, as here, a defendant “ ‘makes [a gun’s] presence known, and there is no evidence to suggest any purpose other than intimidating the victim . . . so as to successfully complete the underlying offense, the jury is entitled to find a facilitative use rather than an incidental or inadvertent exposure. The defense may freely urge the jury not to draw such an inference, but a failure to actually point the gun, or to issue explicit threats of harm, does not entitle the defendant to a judicial exemption from [the enhancement].’ ” (*Wilson, supra*, 44 Cal.4th at p. 807.)

Defendant’s reliance on *Hays, supra*, 147 Cal.App.3d 534 is misplaced. In that case, the victim fled in fear after the defendant crashed through an office ceiling with a rifle. The defendant never held the rifle in his hands or displayed it in a menacing manner. (*Id.* at p. 544.) “Rather, he passively displayed the weapon. It hung across his chest as he came down into the office and was slung over his shoulder once he landed.” (*Id.* at p. 548) Under these circumstances, the appellate court concluded that there was insufficient evidence of “use” because “a bare potential for use” will not support a use enhancement. (*Hays*, at p. 549.)

Hays is distinguishable. Rather than merely displaying his handgun in a passive manner, defendant pulled out his handgun and openly gripped it in his hand as he entered the convenience store. Defendant’s deployment of the gun had no purpose other than to intimidate to facilitate the theft, and therefore far exceeded the “bare potential for use” that was found insufficient to support a use enhancement in *Hays*.

2.0 Instructional Error

Defendant contends reversal is required because the trial court misinstructed the jury on the immediate presence element of robbery. He argues that the robbery instruction given to the jury misstated the law and unconstitutionally lowered the prosecution's burden of proving each element of the offense. The People concede the instructional error but argue that it was harmless beyond a reasonable doubt. We find no reversible error.

2.1 *Additional Background*

Over defense counsel's objection,³ the trial court gave the prosecutor's requested pinpoint instruction on the immediate presence element of robbery. The jury was instructed with a modified version of CALCRIM No. 1600 (Apr. 2015 rev.) as follows:

"The defendant is charged in Count 1 with robbery in violation of Penal Code section 211.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant took property that was not his own;

"2. The property was in the possession of another person;

"3. The property was taken from the other person or his immediate presence;

"4. The property was taken against that person's will;

"5. The defendant used force or fear to take the property or to prevent the person from resisting;

"AND

³ Defense counsel objected to the prosecutor's proposed pinpoint instruction on the ground that it was an incorrect statement of the law.

“6. When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently or to remove it from the owner’s possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property.

“The defendant’s intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery.

“A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short.

“The property taken can be of any value, however slight. Two or more people may possess something at the same time.

“A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person.

“A store or business employee who is on duty has possession of the store owner’s property.

“*Fear*, as used here, means fear of injury to the person himself or herself or injury to the person’s family or property, or immediate injury to someone else present during the incident or to that person’s property.

“Property is within a person’s *immediate presence* if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear.

“An act is done *against a person’s will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.

“A taking begins at the moment a person is separated from his or her property by the use of force or fear. Property is within a person’s immediate presence if he or she abandons control of the property by exercise of another’s force or fear.”

The last paragraph of the instruction is the People’s requested pinpoint instruction that defendant contends misinstructed the jury on the element of immediate presence. As noted by the People, the other language in the instruction tracks the pattern jury instruction on robbery that applied at the time of trial and provided the jury with the legally correct definition of “immediate presence.”⁴

Citing *Hayes, supra*, 52 Cal.3d at page 628, the People agree with defendant that the prosecutor’s pinpoint instruction should not have been given to the jury because it erroneously conflated the “force or fear” element and the “immediate presence” element. According to the People, instructing the jury that “property is within a person’s immediate presence if he or she abandons control of the property by exercise of another’s force or fear,” rendered the “immediate presence” element devoid of independent meaning, making it redundant with the “force or fear” element. In other words, the People agree with defendant’s contention that the challenged language allowed the jury to find immediate presence if the jury found that Scott abandoned the property based on force or fear.

In *Hayes*, our Supreme Court explained, “A taking can be accomplished by force or fear and yet not be from the victim’s immediate presence. For example, a person might enter the victim’s home and there, by the use of force or fear, compel the victim to reveal the combination of a safe located many miles away in the victim’s office. The culprit at the victim’s house could then relay the combination to a confederate waiting in

⁴ CALCRIM No. 1600 has been revised twice since the jury rendered its November 2015 verdict in this case; the revisions have no impact on this appeal. (See CALCRIM No. 1600, rev. Mar. 2017 and Sept. 2018.)

or near the office, who could use it to open the safe and take its contents before the victim could reach the office or otherwise interfere with the taking. In such a case, the criminals would have accomplished the taking by force or fear and yet not have taken property from the person or immediate presence of the victim. The perpetrators of the taking would be guilty of several offenses—conspiracy, burglary, assault, and grand theft at the least—but they would not be guilty of robbery as defined in section 211 because the taking would not be from an area over which the victim, at the time force or fear was employed, could be said to exercise some physical control.” (*Hayes, supra*, 52 Cal.3d at p. 627.)

The victim in *Hayes* was assaulted and killed 107 feet from the motel office where property was taken. (*Hayes, supra*, 52 Cal.3d at pp. 597, 628-629.) The trial court instructed the *Hayes* jury, in relevant part, as follows: “ ‘An act of robbery can be said to have occurred in the victim’s immediate presence as long as the victim perceived any overt act connected with the commission of the offense.’ ” (*Id.* at pp. 627-628.) Our Supreme Court concluded that the jury was misinstructed on the “immediate presence” element of robbery. The court reasoned: “This instruction permitted the jury to find the ‘immediate presence’ element of robbery if any of the acts mentioned in the general definition of robbery occurred in the victim’s presence. In this case, defendant assaulted and killed the victim. The jury could reasonably conclude from the special instruction that the ‘immediate presence’ element was satisfied because the fatal assault was an ‘overt act connected with the commission of the’ robbery and because the fatal assault unquestionably occurred in the victim’s presence. The special instruction thus rendered the ‘immediate presence’ element devoid of all independent meaning, making it redundant with the ‘force or fear’ element. For this reason, the special instruction was erroneous.” (*Id.* at p. 628.)

2.2 Analysis

When, as here, the jury is “misinstructed on an element of the offense of robbery, reversal of the robbery conviction is required unless we are able to conclude that the error was harmless beyond a reasonable doubt.” (*Hayes, supra*, 52 Cal.3d at p. 628; see *People v. Wilkins* (2013) 56 Cal.4th 333, 348-350.)

On this record, we find the instructional error harmless. The undisputed evidence at trial showed that Scott was within approximately 20 feet of defendant when she saw him pull out a handgun as he was entering the convenience store. The undisputed evidence also showed that Scott, shaking and afraid, ran as fast as she could to a nearby store and called the police. While she was on the phone with the 911 dispatcher, defendant left the area with several items from the store. Under the circumstances of this case, we are convinced that the issue of immediate presence could not have reasonably been decided either way. (See *Hayes, supra*, 52 Cal.3d at p. 629 [reversal required where issue of immediate presence could have been decided either way].) Given Scott’s proximity to defendant and the front of the convenience store, no rational jury could have found that Scott’s property was not taken from her immediate presence.

3.0 Senate Bill No. 620

Defendant asserts that remand is warranted in light of Senate Bill No. 620 (2017-2018 Reg. Sess.), which amended section 12022.53 to give trial courts discretion to strike or dismiss the firearm enhancement imposed in this case. We agree.

On January 1, 2018, Senate Bill No. 620 went into effect. (Stats. 2017, ch. 682, §§ 1-2.) Senate Bill No. 620 amended section 12022.53, removing the bar on striking a firearm enhancement and granting the trial court discretion pursuant to section 1385 to strike or dismiss an enhancement. “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision

applies to any resentencing that may occur pursuant to any other law.” (§ 12022.53, subd. (h).)

The amendment to section 12022.53, potentially providing for lesser punishment, is retroactive to cases not yet final. (See *People v. Francis* (1969) 71 Cal.2d 66, 75-76; *In re Estrada* (1965) 63 Cal.2d 740, 747-748.) In *People v. Woods* (2018) 19 Cal.App.5th 1080, this court explained: “[B]ecause there is nothing in the amendment to suggest any legislative intent that the amendment would apply prospectively only, we must presume that the Legislature intended the amendment to apply to every case to which it constitutionally could apply” (*Id.* at p. 1091; accord, *People v. Robbins* (2018) 19 Cal.App.5th 660, 679.)

The People concede that the recent amendment to section 12022.53 retroactively applies to defendant but argue that remand is not appropriate because there is no reason to believe the trial court would exercise its newly granted discretion to strike or dismiss the enhancement. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 (*Gutierrez*) [remand not required where trial court’s comments at sentencing and sentence itself show that “no purpose” would be served by a remand].) We disagree.

Unless the record reveals a clear indication that the trial court would not have stricken or dismissed the firearm enhancement even if at the time of sentencing it had the discretion to do so, remand is required. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.) In sentencing defendant, the trial court characterized the robbery as an “unbelievably violent” crime that significantly hurt the victim and “unalterably” changed her life forever. The court found that the crime involved some level of planning and demonstrated that defendant was a serious danger to society. The court also noted that the penalties for robbing a person with a gun are “rightfully” serious, that defendant would have “to pay a severe consequence” for his actions, and that defendant had committed serious offenses as a

juvenile, including a sexual assault and a robbery with a gun. However, the court chose to impose the midterm sentence on the robbery conviction. In doing so, the court considered defendant's age (20 years old at the time of the crime), the letters of support submitted by his friends and family, the "unusual letter of contrition" he wrote, and the fact that there was no person in the store at the time of the crime.

Unlike the court in *Gutierrez*, we cannot conclude that the record in this case "shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." (*Gutierrez, supra*, 48 Cal.App.4th at p. 1896.) Accordingly, we must remand to afford the trial court the opportunity to exercise its new sentencing discretion. (See *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228 [noting that it is generally appropriate to remand for resentencing when a court proceeded through sentencing erroneously believing it lacked discretion to act in a certain way].)

DISPOSITION

The matter is remanded to the trial court to determine whether to exercise its discretion to strike or dismiss the firearm enhancement imposed under section 12022.53, subdivision (b). In all other respects, the judgment is affirmed.

BUTZ, J.

We concur:

RAYE, P. J.

HOCH, J.